



# BOARD OF INQUIRY (*Human Rights Code*)

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IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Carol Shapiro dated February 24, 1992, alleging discrimination in employment on the basis of creed.

**B E T W E E N :**

Ontario Human Rights Commission

- and -

Carol Shapiro

**Complainant**

- and -

The Regional Municipality of Peel

**Respondent**

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## DECISION

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**Adjudicator :** Heather M. MacNaughton

**Date :** July 16, 1997

**Board File No:** BI-0094-96

**Decision No :** 97-015

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Board of Inquiry (*Human Rights Code*)  
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## APPEARANCES

Carol Shapiro, Complainant

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)

Paul Shapiro, Counsel

Regional Municipality of Peel, Respondent )

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)

Robert W. Little, Counsel



Carol Shapiro alleges that she was discriminated against by the Regional Municipality of Peel ("Peel") on the basis of creed in contravention of Sections 5(1) and 9 of the Ontario *Human Rights Code* R.S.O. 1990 c. H.19, as amended, (the "*Code*"). I was assigned to inquire into Mrs. Shapiro's complaint.

In an Interim Decision released February 3, 1997, I ruled that Mrs. Shapiro could continue with her complaint before the Board in the absence of the Ontario Human Rights Commission who had reached a settlement with Peel. Counsel for Mrs. Shapiro then indicated that he would not be proceeding with the complaint against the individual respondents previously named.

### **The Facts**

There was very little dispute with respect to the facts giving rise to Mrs. Shapiro's complaint.

Mrs. Shapiro is a registered dietician and was hired by Peel as a Public Health Nutritionist in 1984. She held that position until her resignation in 1993. Her qualifications for the position included a Bachelor of Science degree and a Masters of Environmental Studies degree specializing in Public Health. As a Public Health Nutritionist she developed and implemented nutrition education programs for professionals, including teachers, public health officials and physicians, in Peel.

Mrs. Shapiro worked out of Peel's offices in Brampton, but programs were often delivered at various sites in the community and on evenings and weekends. This required flexibility on her part and enabled her to occasionally work at home.

Mrs. Shapiro was not monetarily compensated for overtime. Her overtime was recognized by Peel through the provision of up to a maximum of 35 hours per year (5 days) as compensatory time off. Mrs. Shapiro regularly exceeded 35 hours of overtime in her position.

Mrs. Shapiro was entitled to fifteen days annual vacation. In addition Peel recognized 7 days as paid holidays or statutory holidays. These were New Years Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day and Christmas Day. Peel further allowed Easter Monday, Civic Holiday, Boxing Day, and one floating day, as designated by management, as paid holidays.

Mrs. Shapiro is an observant member of the Jewish faith. She is an active member of her Synagogue, maintains kosher dietary laws in her home, and is actively involved in Jewish service organizations. Mrs. Shapiro observes all of the Jewish holy days. Of these, Rosh Hoshana, Yom Kippour, Succoth and Shemini Azeret, which are both associated with Passover, and Shavuoth are particularly important. Mrs. Shapiro attended at her Synagogue for all, or part, of these holy days. As a result of employment policies in place at Peel, in order to observe Jewish holy days

when they fell on a work day, Mrs. Shapiro was required to use vacation time, time accumulated in lieu of overtime, or to take unpaid leave.

Until 1989 Mrs. Shapiro complied with Peel's policies, and ensured that she had sufficient vacation time, or time in lieu of overtime, available to observe the holidays. However, in 1990 Mrs. Shapiro wrote to her supervisor and indicated that she objected to using her lieu time, or vacation time, for the purpose of celebrating Rosh Hashana. She indicated that in her view Peel was required to accommodate her celebration of her religious holy days. She proposed that she be allowed to make up the time she had used for the observance of Rosh Hashana by working overtime. Peel responded to Mrs. Shapiro's request by declining to change the existing policy, on the basis that not every employee, who might seek religious accommodation, had overtime work available to them to make up for the lost time.

Early in 1991 Mrs. Shapiro indicated to Peel that she would be pursuing her remedies with the Ontario Human Rights Commission. Subsequent attempts to resolve the dispute with Peel were not successful and Mrs. Shapiro ultimately filed the complaint, which led to this hearing.

### Analysis

It has been held by the Supreme Court of Canada in *Chambly, Commission scolaire regionale v. Bergevin* (1994), 115 D.L.R. (4th) 609, and by the Ontario Divisional Court in *The Islamic Schools Federation of Ontario v. The Ottawa Board of Education* (unreported April 27, 1997),



that a calendar which recognizes Good Friday, Easter Monday and Christmas Day as holidays is not a Christian religious calendar but a secular one, despite the historical significance of those days in the Christian calendar. I am bound by those findings. I therefore find that the calendar of work adopted by Peel is a secular calendar and did not directly discriminate against members of the Jewish faith.

However, my inquiry cannot stop there. I must determine whether the secular calendar had the effect of discriminating against Mrs. Shapiro. Discrimination can result from the effects of an otherwise neutral rule. Indirect discrimination or discrimination by adverse effect was defined in *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.* (1985), 23 D.L.R. (4th), 321 (O'Malley) at p. 332 as follows:

.....It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force....An employment rule honestly made for sound economic or business reasons, equally applicable to all to who it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

In my view the work schedule adopted by Peel was discriminatory in its effect. Employees of the Christian faith, were able, if they chose, to celebrate the Christian holy days of Christmas, Good Friday and Easter Monday without using vacation days, lieu days or taking an unpaid leave of absence. In contrast, Mrs. Shapiro, was required to use a vacation day, a lieu day, or an unpaid



leave, to celebrate Jewish holy days. Thus, although by maintaining available holidays or lieu days Mrs. Shapiro suffered no loss in pay, she was required to use a day, to which she was otherwise entitled, for a religious purpose.

### **Accommodation**

When adverse effect discrimination occurs an employer must take reasonable steps to accommodate the individual, or group, adversely affected. What steps did Peel take to accommodate Mrs. Shapiro? Mrs. Shapiro testified that there was sufficient work available in her department and that she could easily have made up any time she took off for religious reasons by working overtime. She was supported in that evidence by Dr. Cole, the witness called by Peel. Peel rejected overtime as an accommodation option because not all employees had overtime work available in their departments. By rejecting the accommodation proposal on that basis, Peel misunderstood the extent of their obligation to accommodate Mrs. Shapiro. The extent of their duty to accommodate was explained in *O'Malley, supra*, at page 335:

The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employee's business and without undue expense to the employer.

The factors to be considered in determining what may constitute reasonable accommodation were set out in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4th) 577:

I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relevant to such an appraisal. I begin by adopting those identified by the board of inquiry in the case at bar - financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustible and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case.

By declining Mrs. Shapiro's proposal to work overtime on the basis that others could not be so accommodated, Peel was narrowing its consideration of the reasonableness of the request for accommodation to one of the factors set out in *Alberta Dairy Pool*. In so doing it failed to consider many of the other factors. Peel did not lead any evidence or argue that the accommodation proposal would have caused it undue financial hardship. Further Peel led no evidence that alternate means of accommodating other employees were unavailable to it.

The law does not require that accommodation be the same for all employees. Imposing such a restriction on the assessment of an accommodation request unduly narrows the scope of the obligation to accommodate and the obligation that undue hardship to the employer be assessed on a case by case basis.

In the result, I was not persuaded that accommodating Mrs. Shapiro's request would have caused Peel undue hardship. Peel therefore failed in its duty to accommodate Mrs. Shapiro.

### **Damages**

In support of her claim for general damages, and damages arising out of mental distress, Mrs. Shapiro testified that she was extremely upset by a settlement offer Peel made to her to resolve her complaint and, further, by what she saw as a failure by Peel to respond directly to her regarding her request for accommodation.

Counsel for Mrs. Shapiro argued that I should hear evidence about the settlement proposal because it was relevant to the issue of Peel's bad faith in its dealings with Mrs. Shapiro. Counsel for Peel countered that the offer arose in the context of settlement discussions and was, therefore, privileged. Peel further argued that the settlement discussions were not relevant because Peel was not relying on them to found their defence of the reasonableness of their accommodation efforts.

I was not persuaded, based on the evidence, that the proposal was privileged. However, there was no evidence on which I could find that Peel had acted in bad faith. Dr. Cole was sincere in his praise of Mrs. Shapiro and was frank in admitting that the settlement proposal was inadequate.

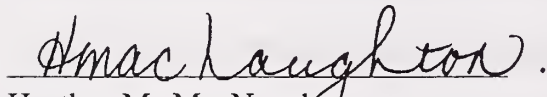
With respect to the communication between Peel and Mrs. Shapiro regarding her request for accommodation, I was not persuaded that Mrs. Shapiro's concerns arose from anything other than

her negative response to the Peel settlement offer. I am therefore unprepared to make any award for general damages, mental distress, or to make a finding that Peel acted in bad faith.

With respect to the claim for special damages, Peel's counsel argued that Mrs. Shapiro did not suffer any loss of vacation time, lieu time, or any loss of pay, in order to celebrate her religious holy days. It was clear from the evidence of both Mrs. Shapiro and Dr. Cole that, subsequent to the issue of religious accommodation being raised by Mrs. Shapiro, Peel did not deduct vacation days or lieu days from Mrs. Shapiro, and paid her for any religious holidays that she celebrated. Therefore, Mrs. Shapiro suffered no monetary loss as a result of the breach of the *Code*.

I therefore declare that the policy in place at Peel in 1989 to 1993 with respect to the observance of religious holidays adversely discriminated against Mrs. Shapiro but award no damages, general or special, because Mrs. Shapiro suffered none.

Dated at Toronto this 16th day of July 1997:

  
Heather M. MacNaughton  
Member, Board of Inquiry